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IN THE

Supreme Court of the United States

October Term, 1965

No. ~~626~~ 26

HAROLD SHEPARD, GEORGE LEWIS and HERMAN BLOOMBERG,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

These cases arise from separate judgments of the Criminal Court of the City of New York which were consolidated for purposes of appeal. Petitioner Shepard was convicted on December 11, 1963, for permitting the sale of an obscene book (New York Penal Law §1141), and was sentenced to imprisonment in the New York City Workhouse for thirty days (R. 529).* Petitioners Lewis and Bloomberg were convicted on November 18, 1963, after a joint trial, for selling obscene publications (New York Penal Law §1141). Both defendants were sentenced to sixty days imprisonment in the Workhouse, and, in addition, were fined $500. In case of default of payment, they were to serve an additional thirty days in prison (R. 550).

* References, unless otherwise indicated, are to pages of the trial transcript.

The Appellate Term of the Supreme Court affirmed the judgments of conviction, one judge dissenting (petition, appendix A), and leave to appeal to the New York Court of Appeals was denied by Associate Judge Stanley Fuld on July 1, 1965 (petition, appendix B).

THE EVIDENCE

A. *People* v. *Shepard*

Harvey Gunson, a New York City detective, testified that on April 10, 1964, he entered a book store called the Liberty Gift Shop where both defendants were employed. After scanning the material offered for sale he made a selection of two books, one entitled *Promenade Bondage, Volume 4* and the other called *The Spanking Nurses* which he took over to the counter where the sales clerk Schiff was standing and said he wanted to purchase them (R. 264, R. 265). Schiff took the books and placed them in a paper bag (R. 271). While at the counter making the purchase, Gunson noticed books, their pages opened to photographic material, and photographs displayed on the racks behind the cash register (R. 264). Gesturing to these displayed books and photographs, Gunson said he would like to purchase one of them also. Schiff then removed a fresh copy of one of the displayed booklets from a drawer behind the counter. Gunson then asked, pointing to a picture displayed on the rack, "Are they all as good as that picture?", and Schiff replied "they are all as good" (R. 265, R. 266). Schiff then handed Gunson the booklet of pictures, entitled *Exotic Center, a Photo Publication,* which contained one of the photographs which was displayed on the rack behind

the cash register, took the two books which Gunson had selected from the shelves, and placed all these articles in a bag, and charged the price of $4.75 (R. 266-7, R. 270). At the time when Gunson was making the purchase, defendant Shepard was standing behind the counter next to Schiff. Promptly after making the purchase Gunson and his partner, Detective Cassoveri, placed Schiff and Shepard under arrest (R. 273, R. 274). Shepard, who was questioned as to his capacity at the store, replied that he was the manager of the store.

B. *People* v. *Lewis and Bloomberg*

Alvin Jones, a detective, testified that he entered the book store where defendants worked on April 10, 1963. Observing in a wooden rack near the front of the store about 300 packets of photographs, cellophane wrapped and displaying a photograph on the front and one on the back of the packet (R. 407-8), Jones selected two packets and gave them to defendant Lewis, asking him if these were the only photographs which he had. Lewis replied, "They are all the same—the best we have got." Lewis was paid two dollars for the pictures and he placed them in a bag and handed it to Jones (R. 412). After making this purchase, Jones continued to look around the store and finally made a selection of two books entitled *Spanking Sisters* and *Bondage—Annual No. 1* which he took over to defendant Bloomberg asking "Are these books any good?", Bloomberg answered, "Well, I have got some better if you can read French." Jones conceded that he could not read French and asked the price of the two books. Bloomberg replied that the price was five dollars and he called over to Lewis, "Give them to him for $2.50 each" (R. 415). Jones

then took the books over to Lewis to whom he paid that price. Upon making this second purchase, Jones identified himself and placed Bloomberg and Lewis under arrest (R. 416).

POINT I

Four of the questions presented are to be considered by this Court in *Mishkin* v. *New York*, October Term, 1965, No. 49. The fifth question, whether a jury trial is constitutionally required in obscenity cases, has been raised on petition for certiorari in *Friedman* v. *New York*, October Term, 1965, No. 1161.

The petition for certiorari raises five questions for consideration by this Court, four of which are presently awaiting argument in No. 49, *Mishkin* v. *New York*. The fifth issue, whether a jury trial is required in obscenity cases, has been raised and is awaiting determination on a certiorari petition in No. 1161, *Friedman* v. *New York*.

Concerning the question of obscenity

The exhibits involved in the present case are of the "bondage" or sado-masochistic type. Shepard was convicted for permitting the sale of two books, *Promenade Bondage, Volume 4* and *The Spanking Nurses*. Lewis and Bloomberg were convicted for selling two packets of photographs and a book, *Bondage Annual No. 1*. These publications are of the same type as those presently before this Court in *Mishkin* v. *New York*, and the offending characteristics of such material is dealt with at length in Point I of appellee's brief in *Mishkin*.

Concerning the vagueness of the statute

With respect to this material, petitioners also claim that the conviction must be reversed because the words "sadistic" and "masochistic" in the New York statute are unconstitutionally vague. This question is also presented in *Mishkin* v. *New York* (see appellee's brief, Point II).

Concerning scienter

An issue is also raised in the present petition as to the mental element of scienter required in obscenity prosecutions. It is argued here, as in *Mishkin*, that a defendant must know the books are obscene. This point is fully treated in Point IV of appellee's brief in *Mishkin*.

While the evidence of knowledge in each case differs, the proof in the present case establishes that the defendants knew the contents of the material sold. Lewis when asked about the two packets of photographs, told the officer "they are all the same—the best we have got" (R. 412). Bloomberg, when asked whether the bondage books selected by the officer were "any good," replied, "Well, I have got some better if you can read French" (R. 415). Both remarks indicate clearly a comparison with other material in the store, and could not have been made unless Lewis and Bloomberg knew the contents of their stock generally, and the purchased material specifically. Shepard, while not orally expressing any opinions as to the material, was nevertheless the manager of the store in which numerous publications of this type were openly displayed. He could not have avoided knowledge of their contents, nor can he

be permitted to "insulate himself against knowledge of an offending book" [*Smith* v. *California*, 361 U. S. 147, 161 (1959)].

Concerning the gathering of the evidence

Petitioners further claim that the failure to hold a prior adversary hearing as to obscenity invalidates the use on trial of evidence purchased by the police. The same issue is considered in Point V of appellee's brief in *Mishkin*.

Concerning the requirement of a jury trial

The issue of whether a jury trial is required in obscenity prosecutions has been raised in *Friedman* v. *New York*, and is treated in Point II of respondent's brief in No. 1161.

Conclusion

Because of the virtually total identity of issues raised in the petition and in *Mishkin* v. *New York*, respondent agrees with petitioners that "it would be appropriate to withhold action on this petition until the *Mishkin* case is adjudicated by this Court" (petition, p. 21).

Respectfully submitted,

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November, 1965